IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.795 OF 2004

IN

APPEAL FROM ORDER NO.102 OF 1991

1.Kanaiyalal Ratilal Ponda & Anr..... Applicants

Versus

1.Mrs.Bhanu Natwarlal Kotak & Ors..... Respondents

Mr.Dewal for the applicants

Mr.Ganga for Respondent NO.1

Ms.Nalini Shah for respondent Nos.3 to 10.

CORAM : P.V.KAKADE, J.

DATE : 31st AUGUST, 2004.

P.C.:

. Rule. Rule made returnable forthwith.

1. This is an application filed by the Applicants seeking recall and/or modify the order dated 12.8.2003

passed by this court in C.A.No.645 of 2003.

. The matter was moved before the regular bench, who was assigned with the work of Appeal from Order. However, the learned single judge (V.C.Daga, J.) by order dated 7.6.2004 passed to the effect that this application is in the nature of review application and it should be kept before this Court who had passed earlier order dated 12.8.2003. That is how, the Hon'ble the Chief Justice has referred this matter to this Court.

2. I heard Mr. Dewal for the applicants, Mr. Gangal and Ms.Nailin Shah for the respondents, who waive service. Perused the record including the affidavit in reply, which reveal the entire background on which the impugned order dated 12.8.2003 came to be passed.

. Appeal from Order No.102 of 1991 came to be admitted on 1.2.1991. Thereafter the matter came on board from time to time and finally on 17.1.2003 Court dismissed the matter for default. Hence the advocate for the appellant had filed C.A.No.645 of 2003 for setting aside the dismissal order dated 17.1.2003 passed in A.O. The said C.A. came up for hearing before this

Court on 12.8.2003 and following order came to be passed:

" Heard larned counsel for both the parties.

. This application is made to recall and set aside the order dated 17.1.2003 passed in A.O.No.102 of 1991 and to restore it to file along with Civil Application No.54 of 2002. It is also prayed that the delay of 73 days caused in filing the civil application be condoned.

. Perused the record and it appears therefrom that the name of the advocate was not shown though he has filed his Vakalatnama as early as on 2.1.2001.

. It also appears that due to some reasons, although Civil Application NO.54 of 2002 was subjudiced and pending, apparently due to the mistake of the Board Department the appeal from order was listed for final hearing, without the Civil Applications. These are the

grounds made while pleadings made for restoration of the appeal, setting aside the order dated 17.1.2003.

. I have also perused the impugned order and other records which support the contentions of the applicant. Learned counsel for the respondent also fairly concedes that the said position is correct. In view of this position the application is made absolute in terms of prayer clauses (a) and (b) and the application stands disposed of with no order as to costs."

It appears therefrom that though it is recorded that both the parties were heard, the record also shows that the Rule was issued by order dated 26.6.2003 in Application No.645 of 2003 filed by the present Respondents represented by Mr. Gangal and Respondent Nos. 3 to 10 represented by the concerned advocate, who also waive service. In other words, it appears that contesting Respondents 1 and 2 were not notified of Application No.645 of 2003.

. In my considered view, this aspect by itself is sufficient to allow this application especially when it appears from the record that C.A.No.645 of 2003 came to be filed against dead person without bringing his legal heirs on record and the impugned Order dated 12.8.2003 came to be passed without serving the Rule on contesting respondents i.e. present applicants. Moreover, it appears that it was not brought to the notice of this Court that the said appeal from order was also dismissed by this Court (Bhairavia, J.) by order dated 26.9.1998 and application for setting aside that order was pending. In view of this position, I am of the view that the application deserves to be allowed in the interest of justice and the contesting applicants must get opportunity to be heard before any order is passed on merits in C.A.No.645 of 2003. Hence the following Order:

> The application is made absolute in terms of prayer clauses (a), (b) and (c). The order dated 12.8.2003 passed by this court is reviewed and recalled. The Civil Application No.645 of 2003 to be fixed for hearing on merits after giving notice to both the

parties. The matter to be put before the regular Court.

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